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January 14, 2004

2004 JAN 14 P 4: 51
Craig Engle
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BY HAND DELIVERY

Jeffery S. Jordan
Central Enforcement Docket
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: **Response to America First Credit Union, Rex Rollo Treasurer, to the Complaint**
MUR 5381

Dear Mr. Jordan:

The original and one copy of the Response to the Complaint in the above-captioned matter are enclosed. Please receipt-stamp both pages of the letter marked "copy" and return to the messenger.

As you know, the Complaint in this matter alleges that America First Credit Union ("AFCU") improperly made a loan to Mr. Robert Bishop. As discussed at length in the Response, the loan to Mr. Bishop was made in the ordinary course of business. To show that the loan was made using the same guidelines and data AFCU uses for any loan application, it was necessary to reference Mr. Bishop's personal financial data in the Response and to produce documents containing this data.

This financial information is protected by the Freedom of Information Act ("FOIA") and the Commission's internal policies.

As stated in the letter you sent to me on December 12, 2003, "it has been the practice of this agency to withhold from the public records documents, or portions of documents, that are exempt from disclosure under" FOIA, and the types of protected documents include those that "implicate personal privacy." In addition, your letter states the decision in AFL-CIO v. FEC limits the information that the Commission is permitted to publicly disclose, and represents the Commission will "make every attempt to ensure that only those documents that are appropriate for disclosure are placed on the public record." Finally your letter asks AFCU to "preliminarily identify those documents that [it] feel[s] should remain confidential."

Based on your letter, the FOIA requirements, and the Commission's internal policies, we have designated Mr. Bishop's financial information as personal and confidential. Specifically, we have provided a Response and a supporting affidavit that include Mr. Bishop's personal financial information as well as versions in which this information is redacted. The un-redacted versions are for the internal use of the Commission, and the redacted versions may be put into the public

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record. We have also labeled the documents containing Mr. Bishop's personal financial information, such as loan applications and credit reports, as "Confidential – Not Subject to Public Disclosure." As required by FOIA and Commission regulations, please notify me if you intend to release the information designated as confidential to the public so that an appeal may be filed.

Thank you for your attention to these matters and please do not hesitate to contact me with any questions.

Sincerely,


Craig Engle

Enclosures:

Confidential Response of America First

Table of Contents of Protected Documents

Redacted Response of America First for Public Disclosure

Confidential Affidavit of Barney Chapman

Redacted Affidavit of Barney Chapman for Public Disclosure

cc: Barney Chapman

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter Of:

America First Credit Union,)
Rex Rollo, Treasurer,) MUR 5381
et al.)

RESPONSE OF AMERICA FIRST CREDIT UNION,
REX ROLLO TREASURER, TO THE COMPLAINT

This response rebuts the allegations America First Credit Union (the
"Respondent" or "AFCU") made a loan to Mr. Robert Bishop in a manner inconsistent
with the Federal Election Campaign Act (the "Act"), and failed to report the cost of
certain partisan communications.

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1. The Confidential Nature of the Information Submitted in this
Response

The Complaint in this matter involves an allegation the Respondent made a
personal loan to Mr. Bishop in violation of the Act. Given the subject matter of the
Complaint, this response includes information regarding Mr. Bishop's personal finances.
As discussed further below, this information is protected from disclosure by Federal
Election Commission (the "Commission") policy and the Freedom of Information Act
("FOIA"), 5 U.S.C. §§ 551 et seq.

The Protected Documents

The following exhibits (hereinafter "Protected Documents and Exhibits") to this
Response are protected pursuant to Commission policy and FOIA:

- a. Exhibit 1 – AFCU Internal Summary of Bishop Car Loan Activity (1)
- b. Exhibit 2 – AFCU Internal Summary of Bishop Car Loan Activity (2)
- c. Exhibit 3 – AFCU Internal Summary of Bishop Signature Loan Activity

- d. Exhibit 4 – AFCU Internal Summary of Bishop VISA Platinum Card

Account

- e. Exhibit 5 – Copies of Bishop Payments to AFCU for Signature Loan

f. Exhibit 6 – Loanliner Security Agreement and Supporting Documents for
Car Loan (1)

g. Exhibit 7 – Loanerliner Security Agreement and Supporting Documents
for Car Loan (2)

h. Exhibit 8 – Loanliner Security Agreement and Supporting Documents for
Signature Loan

As discussed further below, the Protected Documents and Exhibits contain Mr. Bishop's personal financial information, including his income, debts, social security number, re-payment amounts, and personal account information. While Respondent understands the Commission must have access to this data to evaluate the Complaint effectively, this information cannot be shared with the general public.

Portions of this Response and the attached affidavit from Mr. Chapman also contain personal financial information that is protected from disclosure. Respondent is submitting a second version of this Response and the Chapman affidavit that redacts this personal financial information. In addition, Respondent requests this same information be redacted from documents prepared by the Commission, such as General Counsel's Reports.

Commission Policy

On December 5, 2003, the Commission issued a Proposed Policy Statement (the "Policy") regarding placing documents related to closed cases on the public record. The

Policy resulted from a court decision holding the Commission's disclosure regulation, 11 C.F.R. § 5.4(a)(4), was impermissible under the First Amendment. See AFL-CIO v. FEC, 333 F.3d 168, 179 (D.C. Cir. 2003).

The Policy lists ten types of documents that will be released after enforcement proceedings are closed. (See Policy at p. 4-5). The Commission's rationale in releasing these types of documents stems directly from the Court's decision, namely: the documents listed either do not implicate the Court's First Amendment concerns or "they play a critical role in the resolution of a matter," and the "balance [therefore] tilts decidedly in favor of public disclosure, even if the documents reveal some confidential information."

According to the Policy, the "Commission is not placing on the public record certain other materials from its investigative files such as subpoenaed records, deposition transcripts and other documents produced in discovery, even if those evidentiary documents are referenced in, or attached to, documents specifically subject to release under this interim practice." If "a document or record is referenced in, or attached to, a document specifically subject to release under this interim practice, that document or record will be disclosed if it is, or was, otherwise publicly available."

Respondent's Protected Documents and Exhibits are protected under the Commission's Policy for two reasons. First, the documents are evidentiary or are the type of documents the Commission would subpoena after finding Reason To Believe because they are not "otherwise publicly available." For example, Respondent's internal summaries of Mr. Bishop's loan history and his loan application are evidentiary, factual documents, not filings containing legal or policy reasoning such as is typically contained

in documents prepared by the Commission or Respondent. The fact that these documents are submitted voluntarily to the Commission in response to a complaint (rather than pursuant to a subpoena or discovery request) does not change their nature or affect whether they should be disclosed. The Commission has correctly found in the Policy that evidentiary documents "may require a closer balancing of the competing interests cited by" the Court and will be disclosed "only after a full rulemaking with the opportunity for public comment."

Second, the information at issue does nothing to promote the Commission's goals. As stated in the Court's decision, the Commission seeks to release the maximum amount of information possible to deter future violations and promote the Commission's accountability. Releasing personal information about Mr. Bishop, such as his credit rating, serves neither of these goals particularly if the Commission ultimately finds no violation of the Act has occurred. To the contrary, releasing this information could discourage candidates from seeking loans in a lender's ordinary course of business because of the risk a complaint will be filed and personal financial information will be publicly disclosed.

FOIA

Section 552(b) of FOIA provides two exemptions that are applicable to the information at issue. Section 552(b)(6) exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal

privacy.” 5 U.S.C. § 552(b). Section 552(b)(4) exempts “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”¹

Courts have interpreted both of these exemptions as encompassing personal financial information. The Supreme Court has set out a two-part test to determine whether Section 552(b)(6) applies: (1) “does the file include personnel, medical or ‘similar’ data; and (2) if so, would disclosure be a ‘clearly unwarranted’ invasion of personal privacy.”² The first portion of the test is not construed as including a “narrow class of files containing only a discrete kind of personal information, “but rather applies to any records on an individual which can be identified as applying to that individual.”³ When determining whether disclosure of the records constitutes an unwarranted invasion of privacy, the individual’s right to privacy is balanced against the public benefit of disclosure.⁴

There is no question the first part of the Supreme Court’s non-disclosure test is satisfied because Respondent’s Protected Documents and Exhibits contain data easily identified as personally applying to Mr. Bishop. The second part of the test is also satisfied because release of the information constitutes an unwarranted invasion of privacy. As stated, the information includes Mr. Bishop’s address, social security number, account numbers, copies of checks written by him, salary information, lists of creditors, and credit report information. Courts have held that information such as names

¹ The Commission has adopted regulations implementing FOIA. Specifically, Section 4.5(a)(4) states that “financial information obtained from a person” that is “privileged and confidential” is exempted from disclosure. Section 4.5(a)(6) exempts “personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”

² Heights Community Congress v. Veterans Administration, 732 F.2d 526, 528 (6th Cir. 1984), quoting United States Dept. of State v. Washington Post Co., 456 U.S. 595, 601-602 (1982).

³ State Dept., 456 U.S. at 601-602.

⁴ Heights Community Congress, 732 F.2d at 528

of borrowers, social security numbers, property addresses, and the amounts of loans are exempt from disclosure under Section 552(b)(6).⁵

The information is also protected under Section 552(b)(4). Information is protected under Section 552(b)(4) if it is "commercial or financial," "obtained from a person outside the government," and "privileged or confidential."⁶ Courts have held banking records, *including information submitted to receive loans*, constitute "financial information."⁷ Financial information must be considered confidential where it is not generally released to the public and is "likely to impair the government's ability to obtain necessary information in the future."⁸

The protected information at issue here clearly qualifies as "financial": it consists of the loan applications and other banking documents. The information also would not typically be released to the public. To the contrary, personal financial information is rarely released to the public without consent and is actually protected by statutes such as the Fair Credit Reporting Act. Finally, release of this information would impair the Commission's ability to obtain such information voluntarily in the future. As written, the Commission's policy states that information obtained through subpoena or discovery will not be placed in the public record. If the Commission fails to protect the type of financial information at issue here under Section 552(b)(6), then respondents have no incentive to voluntarily release personal financial data in an initial response to a complaint. Instead,

⁵ Heights Community Congress, 732 F.2d at 527 (affirming district court decision withholding "the property address, the loan amount and the identity of the lender" pursuant to Section 552(b)(6))

⁶ Professional Review Organization of Florida v. Department of Health and Human Services, 607 F. Supp. 423, 425 (DC District Court 1985), citing National Parks and Conservation Assn., 498 F.2d 765 (D.C. Cir. 1974)

⁷ See e.g. Sharyland Water Supply Corp. v. Block et al., 755 F.2d 397 (5th Cir. 1985) (reports filed with a Farmers Home Administration to obtain loans are "financial information")

⁸ Continental Oil Co. v. Federal Power Commission, 519 F.2d 31, 35 (5th Cir. 1979).

respondents will choose to wait until such information is subpoenaed or requested in discovery so as to avoid public disclosure of personal data. This will increase the Commission's workload and the length of time required to dispose of MURs. Without giving these protections, the Commission will be forced to proceed to the discovery stage to evaluate cases fully.⁹

In accordance with Section 4.5(a)(4) of the Commission's regulations, Respondent will submit a request for confidential treatment to the FOIA officer.

2. The Loan to Mr. Bishop Was Made in the Respondent's Ordinary Course of Business and on a Basis Which Assures Repayment.

Facts. On or around June 17, 2002, America First Credit Union member Robert W. Bishop applied for and received a \$ _____ loan from the Respondent. The loan was granted on the same objective terms and computer-driven criteria any credit union member of Mr. Bishop's income, prior lending history and credit score would have received. The loan was within the Respondent's concrete guidelines on making signature loans and was executed in the very same manner Respondent makes thousands of signature loans each year. The loan was evidenced by a written agreement, bore an interest rate and due date, and was promptly satisfied by the borrower's payments. Affidavit of Barney B. Chapman at ¶¶8-13.

The Respondent and all its employees, credit risk analysts and senior loan officers followed every written guideline, internal point score system and computer generated

⁹ Courts have also recognized that the exemption does not protect "all data" contained in confidential financial statements, "but only that information which cannot be rendered sufficiently anonymous by deletion of the filing party's name and other identifying information." National Cable Television Association v Federal Communications Commission, 479 F 2d 183 (D C. Cir. 1972). As such, Respondent asks only that certain information from this document as well as the Chapman affidavit be redacted by the Commission before being placed in the public record.

recommendation Respondent routinely uses in making loans. Chapman at ¶13. To contend otherwise in this day of strict banking oversight and the particular sensitivities of credit union management is, quite frankly, absurd.

For a credit union member to receive a signature loan from the Respondent, he or she must complete a standard financial application with one of Respondent's loan officers. That standard application was used in this case. This process requires the applicant to disclose all his assets and liabilities, permits the Respondent to do a credit check, and requires the applicant to sign a certification stating that all statements made in the application are true and complete. That procedure was followed in this case. Chapman at ¶8.

The information gathered for signature loans is analyzed and factored using the Fair Isaac Risk Model. The Fair Isaac Risk Score uses comprehensive credit information and extensive data analysis techniques to develop credit risk predictions. This involves an in-depth review of an applicant's credit file to support, reject or calibrate lending decisions. That process was used in this case. Chapman at ¶7, ¶9.

Respondent began using a customized Fair Isaac internal point score system in 1992. In 2001, Respondent tested its system with other nationally used applications of Fair Isaac to check its credit scoring performance. The overall performance of Respondent's Fair Isaac system performed better than other computer-generated scoring applications. It was this double-checked credit scoring system that was used to make the lending decision in this case. Chapman at ¶7, ¶9.

The Fair Isaac system generates scores typically between 460 and 818. A score above 675 indicates the borrower is a "low risk." Mr. Bishop's Fair Isaac score was

Respondent also has an internal point score system with three general categories: 239 or less, 240 to 309, and 310 and higher. A point score of 310 or higher is considered a very good credit score. Mr. Bishop's internal score was _____. Chapman at ¶9.

The loan products most typically sold by the Respondent for lending small amounts (less than \$50,000) to members with a high credit rating (an internal point score of 310 and above) is a signature loan, a line of credit, a credit card or a combination of the three. A signature loan is a publicly-advertised product regularly promoted in Respondent's literature and is designed to give credit union members ready access to amounts the Respondent has available to lend. Signature loans do not typically require direct security or collateralization because they are only offered in small amounts (less than \$50,000) and only to members of good credit. All signature loans do, however, require the borrower to agree and acknowledge the credit union's cross-collateral and offset provisions which stipulate that any collateral pledged for other outstanding loans with the credit union and any other assets the borrower has on deposit may be seized for non-payment of a signature loan. A signature loan carries a higher interest rate than loans directly secured by vehicles or real property. On June 1, 2002, the advertised rate for a 48-month signature loan was 9.50%. On June 17, 2002, Mr. Bishop received a 48-month signature loan for 9.50%. Chapman at ¶10, ¶13.

If an initial lending decision on a signature loan greater than \$15,000 is made by a loan officer, a second more senior loan officer (authorized by the Board of Directors) must review the decision to add his or her approval or comment. In this case, a second senior loan officer did approve the initial lending decision to Mr. Bishop. Chapman at ¶5, ¶11.

Once a loan is approved, a standard form Loanliner® Security Agreement is generated which lists the number and the amount of the loan, the payer and account number, the interest rate, due date, and payment schedule. This procedure was followed in this case: loan number #3 for \$_____ was issued to Robert W. Bishop with an annual percentage rate of 9.500% (variable) with the first payment of \$_____ due on 07/30/2002 and each payment due thereafter on a monthly basis. Chapman at ¶12, ¶13.

Importantly, the Loanliner® agreement states that if the borrower is in default, the Credit Union may require immediate payment of the entire amount due. The Agreement also requires the borrower to “make payments as disclosed above in accordance with the terms [of the borrower’s] Plan.” This includes cross collateralization of security pledged for other loans and the right to offset other accounts. Those provisions were applicable to in this case, since at the time of this signature loan Mr. Bishop had an outstanding collateralized car loan and other deposits with the credit union. Chapman at ¶12, ¶13.

After loan proceeds are disbursed, the borrower is expected to make timely payments of principle and interest. In this case, the borrower was expected to make 48 payments of \$_____ on or around the 30th of each month. In fact, the borrower actually repaid the loan more quickly than required:

<u>Repayment Date</u>	<u>Payment Amount</u>
7-27-02	\$ _____
9-7-02	\$ _____
10-7-02	\$ _____
11-19-02	\$ _____
12-24-02	\$ _____
1-28-03	\$ _____
2-10-03	\$ _____
3-1-03	\$ _____
3-11-03	\$ _____
4-14-03	\$ _____
5-13-03	\$ _____
Total Paid	_____ \$ _____
Amount Due	0

Chapman at ¶14.

Respondent is pleased with the lending decision it made in this case. Like every financial institution, Respondent is in the business of lending money with the purpose of being repaid with a profit. That is what occurred in this case. In the Respondent's history of the making hundreds of millions of dollars of signature loans, the amount lost through late or non-payment is at or below industry standards. And to put this \$_____ loan into perspective, Respondent currently has over \$2 billion dollars in outstanding

loans – not all of which have the excellent repayment record as Mr. Bishop's signature loan. Chapman at ¶4, ¶15.

In support of the above facts, enclosed please find the sworn affidavit of Mr. Barney B. Chapman, Senior Vice President and Chief of Staff of America First Credit Union, and Protected Documents and Exhibits documenting the Respondent's adherence to its ordinary business practices. As discussed, the Protected Documents and Exhibits are protected from public disclosure by the Commission Policy and FOIA.

Law. The Commission has quite correctly been vigilant in ensuring bank loans are made on a basis which assures repayment and not on the basis of favoritism or outside a lending institution's ordinary course of business.

In this case, there is no question the Bishop loan met the statutory requirements of being evidenced by a written instrument, subject to a due date or amortization schedule and bore the usual and customary interest rate offered by the lending institution. 2 U.S.C §431(8)(B)(vii)(II), (III). The only question is whether the loan was made "on a basis which assures repayment." *Id.* at (II).

Putting aside the compelling fact the loan was *repaid ahead of schedule*, the Commission's regulations require a loan (or line of credit) to either be secured in some fashion or guaranteed by future fundraising receipts. 11 C.F.R. 100.7(b)(11)(i)(A), (B).¹⁰ If a loan does not meet either of the above criteria, the Commission "will consider the totality of the circumstances on a case-by-case basis in determining whether a loan

¹⁰ On August 5, 2002, the Commission reorganized 11 C.F.R. 100.7 and 100.8 67 Fed. Reg. 50582 This response uses the citations in effect when the activities occurred that are the subject of the Complaint.

was made on a basis that assures repayment.” 11 C.F.R. 100.7(b)(11)(ii). In its

Explanation and Justification for this provision, the Commission wrote:

The *proposed* rules contained a *presumption* that a loan not obtained under either of the methods set forth [i.e., collateralized or secured by future receipts] would not be considered made on a basis which assures repayment, unless the candidate or political committee could show otherwise. However, the Commission has now decided to consider the totality of the circumstances on a case-by-case basis in determining whether loans that do not meet the [two] criteria set forth were made on the basis which assures repayment.

- - - -

[This] leaves open the possibility that other approaches, such as loans *guaranteed in whole or in part by the borrower's signature*, which are not specified in the rules, will also be found to have met this standard in specific cases.

56 Fed. Reg. 67118 (*emphasis added*).

Accordingly, the Commission has specifically recognized signature loans can be made on the basis which assures repayment and that these loans should not be presumed to have been made in violation of the Commission's regulations.

The Commission's decision in Advisory Opinion 1994-26 is instructive in deciding this case. In that Opinion, the Commission considered whether a candidate could use \$50,000 of pre-existing lines of credit to finance his Congressional campaign. The lines of credit were signature lines granted on the basis of the individual's credit. The individual was the sole owner of the lines and the source of funds for any repayment of the lines was the individual's personal income.

The question presented in that Opinion was whether “borrowing funds on the foregoing signature lines of credit ‘where there exists an executed loan agreement

documenting an obligation to repay on a fixed installment basis with interest' entails a method that assures repayment."

The Commission answered yes. The proposed use of these lines was considered under the case-by-case option, and the Commission noted (1) the lines pre-existed the candidacy, (2) were based on the requestor's personal financial status, (3) are evidence of a longstanding relationship between the lending entities and the requestor, (4) have terms (interest payments, due dates, overdue payments, acceleration and cancellation provisions) that are not out of the ordinary or unduly favorable, and (5) are evidenced by documents indicting these agreements are standard lines of credit.

In this case, four of the five facts noted above are present. Mr. Bishop was a four-year member of the credit union before this loan was requested, the decision to lend was made on the basis of his sole personal financial status (income and credit score), the lending agreement has written terms not out of the ordinary or unduly favorable, and the documents submitted show this to be a standard, signature loan with acceleration, cross-collateralization, offset and cancellation provisions.

The only fact distinguishing the two cases is that the Advisory Opinion requestor's lines of credit pre-existed his candidacy. This fact was not, however, dispositive in the Commission's Opinion since the Commission wrote:

Based on the pre-existing and long-standing nature of these arrangements, *as well as the terms*, the Commission concludes that you may make the proposed draws for the purposes of your House Campaign.

FEC Advisory Opinion 1994-26 (*emphasis added*).

Accordingly, as a matter of fact, law and precedent, the Respondent's granting of this line of credit to Mr. Bishop was within the customary nature of banking in general

(and the Respondent's institution in specific). The documentation and enclosed affidavit demonstrate Respondent's clear adherence to its lending practices, which are similar to those of nearly every credit union. The loan's terms and amount were ordinary and customary. The loan was made on a basis that assured repayment and was, in fact, repaid. The Commission should find no reason to believe any violation of the Act occurred in this transaction and close the file.

2. Respondent's Partisan Communications Were Properly Made and Reported.

Facts. From June 14-21, 2002, Respondent sent four postcards to some of its individual credit union members advocating the election of Rob Bishop to the U.S. House of Representatives for the First Congressional District in Utah. The Respondent did not send a postcard to every member in the First Congressional District. Instead, it reduced the number of recipients to approximately 34,225 by targeting only those members who also appeared on the county clerks' lists as Republican primary voters. Respondent reported the production, printing, mailing, and handling costs associated with these four postcards to the Commission on FEC Form 7 (Exhibit A). Chapman at ¶17.

Respondent sent to its respective individual members a copy of the Summer 2002 issue of the *Credit Union Advocate*. The *Credit Union Advocate* is a quarterly publication of the Utah credit unions, and the Summer 2002 edition contained articles on the following topics: (1) Utah nonfederal candidates; (2) the safety afforded by credit unions; (3) rising bank fees; and (4) low credit union fees. In addition, this issue included an article advocating the election of Rob Bishop to Congress. The credit unions paid all of the printing, mailing, and handling costs directly attributable to this issue of the *Credit*

Union Advocate. The costs were apportioned to each of the state's credit unions based upon the number of its members receiving the Summer 2002 issue. Chapman at ¶18.

Respondent also engaged in two days of GOTV calls (Exhibit B) and one other, small mailing advocating the election of Rob Bishop to the United States Congress (Exhibit E). Chapman at ¶18.

The Complaint makes several unsubstantiated claims against the Respondent. First, the Complaint alleges the Respondent underreported its costs associated with the postcard flyers. Although the Complaint notes the Respondent timely filed Form 7 with the FEC, the Complaint infers underreporting based upon its own estimate of 400,000 credit union members in the First Congressional District and its guess that flyers were sent to or made to each individual member.

Second, the Complaint alleges the Respondent failed to report the communication costs associated with the summer 2002 issue of *Credit Union Advocate*, which had roughly one-quarter of its contents and text urging support for Rob Bishop.

Third, the Complaint alleges the Respondent underreported the costs of certain pre-recorded telephone messages.¹¹ In each case the Complaint's allegations are wrong as a matter of fact or law.

Law. Under the Act and the FEC's regulations, corporations and trade associations may communicate on any subject, "including communications containing express advocacy," with their restricted class. 11 C.F.R. § 114.3(a) (2002). Among other things, corporations may communicate using publications and phone banks, § 114.3, and

¹¹ The Complaint also makes other general allegations, but not particularly against this Respondent. America First Credit Union has no information about allegations that do not pertain to it or information about the conduct of others.

payments for such partisan communications are not “expenditures” under the Act,
§ 100.8(b)(4).

A corporation’s restricted class is its stockholders, executive or administrative personnel, and their families. § 114.1(j). For incorporated trade associations and incorporated membership associations, the restricted class consists of its members, executive or administrative personnel, and their families. In Advisory Opinion 1998-19, the Commission recognized the members of a credit union are the individuals who maintain share accounts in the credit union.

A corporation must report on FEC Form 7 costs “directly attributable” to partisan communications made to its restricted class expressly advocating the election or defeat of a clearly identified candidate which exceed \$2,000 per election. 11 C.F.R. §§ 114.3(b), 100.8(b)(4) & 104.6. A corporation need not report costs associated with “communications primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate.” § 100.8(b)(4). “Election,” for this requirement, is dually defined as: (1) all primaries for federal office, wherever and whenever held, and (2) all general elections for federal office, wherever and whenever held. § 100.8(b)(4)(v). “Candidate” under the Act means “an individual who seeks nomination for election, or election, to federal office.” § 100.3(a).

Argument.¹² The Complaint was based upon incorrect information and inaccurate assumptions about the number of individual credit union member-recipients of the postcard flyers. The number of member-recipients was substantially smaller than

¹² Respondent incorporates by reference the facts, arguments and affidavits presented to the Commission in the Response of the other seven credit unions and the Utah League of Credit Unions on all matters not specifically addressed here and those not directly alleged in the Complaint against the Respondent.

alleged and all of the expenses directly attributable to the communications were reported to the FEC on Form 7. Furthermore, the costs associated with the *Credit Union Advocate* were not required to be reported to the FEC because the newsletter was “primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate.”

The Respondent fully reported the expenses directly attributable to sending the four postcards to some of its members advocating the election of Rob Bishop. Respondent did not send a postcard to every individual member in the First Congressional District. Instead, the Respondent substantially reduced its mailing list by merging credit union member lists with public records of primary voters. In total, Respondent mailed postcards to approximately 34,225 members. Each member received four different cards. The cost of each mailing was approximately \$8,425.29. Respondent paid the cost of producing, printing, mailing, and handling the postcards sent to its respective members. Respondent then reported all of these expenses to the FEC on July 15, 2002.

Attached are invoices documenting the costs of the mailings and the corresponding Form 7 (Exhibits A, C, D). It is clear the Respondent did not underreport the expenses associated with their member postcards. Contrary to the allegations in the Complaint (which hypothesized the number of recipients to be 400,000) the Respondent sent postcards to only approximately 34,225 credit union members in the First Congressional District. The costs for these postcards were much lower than estimated in the Complaint (which was based upon faulty premises) and were fully reported to the

Commission. Accordingly, the Commission cannot find reason to believe that the Credit Unions underreported the expenses directly attributable to the postcards.

The Respondent did not violate federal election law by not reporting any expenses directly attributable to the newsletter described in the Complaint. FEC regulations do not require reporting of the newsletter. The edition of the newsletter discussed in the Complaint was the Summer 2002 issue of the *Credit Union Advocate*, a quarterly publication of the Credit Unions that is sent to individual credit union members around the state of Utah.

The Credit Unions and the League were not required to report the cost of the *Credit Union Advocate* because the Summer 2002 issue was “primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate.” 11 C.F.R. § 100.8(b)(4). There is no caselaw nor any Advisory Opinion further defining the phrase “primarily devoted to.” The newsletter, however, did not trigger expenditure reporting under any plain-English interpretation of the Commission’s regulations because the word “primarily” means “for the most part” and “chiefly.” Merriam-Webster’s Collegiate Dictionary 923 (10th ed. 2000).

First, express advocacy of the election or defeat of a federal candidate appears only on one of the four pages of the newsletter, with a small teaser also appearing on a second page. The remainder of this 4-page issue of the newsletter, which was distributed to 300,000 individual credit union members statewide (and not just in the First Congressional District), concerned Utah nonfederal candidates, the safety afforded by credit unions, rising bank fees, and low credit union fees.

Second, only approximately 10 5/8 column inches of text (not including headlines, pictures or art) contained express advocacy of the election or defeat of a federal candidate. Approximately 24 1/2 column inches, on the other hand, related to the additional topics described above.

Third, only approximately 50 square inches of the printed materials (including headlines, pictures, and art but not including the address and return address) contained express advocacy of the election or defeat of a federal candidate. Approximately 191 square inches of the printed materials related to the non-express advocacy described above.

Under none of these calculations can the portion devoted to the express advocacy of the election or defeat of a federal candidate be said to equal more than 50% of the newsletter. Neither can it be said that more than 50% of the Summer 2002 issue even concerned a clearly identified federal candidate. The newsletter, then, cannot be said to be "chiefly" about the election or defeat of a federal candidate, nor did it contain express advocacy "for the most part." Accordingly, the *Credit Union Advocate* was not "primarily devoted to" the express advocacy of the election or defeat of a federal candidate, and per section 100.134(a) of the Commission's regulations the expenses related to the newsletter were not reportable to the FEC.

The Complaint is also incorrect that the Respondent underreported the expenses connected with the pre-recorded GOTV telephone messages. Again, the Complaint merely speculated about the number of calls that were made. As the attached exhibit shows, America First conducted 21,173 messaging GOTV calls on June 20, 2002 and 16,272 messaging GOTV calls on June 24, 2002. The costs of these calls were \$2,329.02

and \$1,789.92 for a total of \$4,143.95 (including a \$25.00 recording list management and reporting fee). This amount corresponds to the FEC Form 7 signed by America First disclosing that \$4,143.95 was spent on telephone calls on June 20 and June 24, 2002. No other telephone calls were made and all costs were properly and fully reported.¹³

As a result of the facts and law discussed above, and the attached affidavit, the Commission should find no reason to believe the Respondent violated any provision of federal election law related to the making and reporting of partisan communications by the Respondents.

Respondent requests the Commission find no reason to believe Respondent violated any provision of the Federal Election Campaign Act and close the file.

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¹³ As noted above, Respondent also made one small mailing to select members of the credit union. The Complaint does not specifically allege any violation in this instance because none occurred. The cost of this mailing was \$1,226.46 and was correctly reported to the FEC.

**AFFIDAVIT OF BARNEY B. CHAPMAN
IN RESPONSE TO MUR 5381**

1. My name is Barney B. Chapman. I am a Senior Vice President and the Chief of Staff of America First Credit Union. I have been employed by America First for 35 years and have held a variety of positions including Senior Loan Officer. I am familiar with all the operations and procedures of America First, including its lending approval process. I am personally familiar with the facts and circumstances regarding the signature loan and partisan communications at issue in MUR 5381.

2. America First Credit Union was incorporated on April 21, 1939. It is a federally chartered credit union with assets of \$2.6 billion dollars and has more than 340,000 members. America First Credit Union is owned by its members, directed by a Board and managed by a staff of over 1,000 full-time professionals, loan officers, auditors, underwriters, credit analysts, customer service representatives and other professionals. America First Credit Union has 47 branches and is one of the largest credit unions in the United States. Although our CAMEL rating cannot be publicly disclosed, America First Credit Union is in the top ten percent of credit unions in the United States on the basis of asset performance.

3. Our 11-member Board approves our lending policies and products. America First Credit Union offers a variety of loans to its members. These range from traditional home mortgages, home equity lines, car and boat loans, signature loans, credit cards and lines of credit. All of these products are regulated by the National Credit Union Association and overseen by the credit union's Executive Vice President of Operations.

4. America First currently has over \$2 billion in loans outstanding to its members. Each one of these loans is evidenced by a written agreement and has an interest rate, due date or amortization schedule. Many of these loans are not secured or collateralized. The purpose and goal of having a wide variety of lending products and different collateralization requirements is to give our members flexibility and choices, and to earn profit for the credit union through the repayment of loans with interest. Our lending policies have been in place for many years and are specifically stipulated by the Board of Directors. Approximately 35 credit union employees have the authority to approve signature loans up to \$50,000 and 12 people are specifically authorized to approve signature loans greater than \$50,000.

5. Signature loans, lines of credit and revolving credit cards are the most popular and widely used lending vehicles at America First. These loans are granted on a daily basis and account for several hundred million dollars of our outstanding loans. These lending products typically range from \$1,000 to \$50,000. In one special instance, a signature loan was granted for \$60,000. Loan officers have the authority to authorize a signature loan up to \$15,000. Amounts above that require the review of another, more senior loan officer, and amounts above \$50,000 require market branch manager approval.

6. Signature lines are granted to our members on the basis of their income, assets, history with the credit union and, most importantly, their credit score. These products are very secure. Our loss on signature loans through late payment or nonpayment is at or below industry norms.

7. America First's method of granting a signature loan is very objective. Lending decisions are primarily based on a test, driven by computer modeling or

factoring by the Fair Isaac Corporation (NYSE: FIC), which is one of the world's largest credit analysis corporations. Most leading banks and credit card issuers rely on Fair Isaac FICO scores to analyze and manage credit risk. Fair Isaac creates predictive modeling to score an individual's credit score. America First Credit Union has been using a customized version of Fair Isaac since May of 1994 and in 2001 agreed to a validation of its customized system relative to other FICO systems to measure relative model performance. A Kolmogorov Smirnov (KS) statistic was used to gauge the performance of our version of Fair Isaac. The results revealed our custom credit scoring system performed better than standard models. It is this system which generated the FICO and internal credit score used to lend money to Mr. Bishop.

8. For a credit union member to receive a signature loan, he or she must typically complete a financial application with one of our loan officers. The process requires the applicant to disclose all his or her assets and liabilities, permits the credit union to do a credit check, and requires the applicant to sign a certification stating that all statements made in the application are true and complete. Mr. Bishop completed this financial application.

9. America First Credit Union processed Mr. Bishop's information (including his positive performance on prior loans with the credit union) into Fair Isaac and our internal scoring system. Fair Isaac returned a point score of ____ for Mr. Bishop. An individual scoring greater than 675 is considered "low risk." The lowest Fair Isaac score seen by American First Credit Union in recent years is 460 and the highest is 818. America First Credit Union also has a duplicate internal three-part scoring system (which includes other criteria such as the member's performance on prior loans with the credit

union) which rated Mr. Bishop at _____. This placed him the highest category of borrowers with a “very high” likelihood of repayment.

10. America First Credit Union typically offers one of three (or a combination of) lending products when making small loans (less than \$50,000) to our members with high credit scores (310 and above): a signature loan, a line of credit or a credit card. A signature loan (also known as a “personal loan”) is advertised in the credit union’s promotional materials and is designed to give members ready access to amounts the credit union has available to lend. Signature loans do not typically require security because they are usually offered in less than \$50,000 amounts and to members of good credit. All signature loans do require, however, cross-collateralization of a member’s collateral on other loans and offsets on other amounts on deposit with the credit union. A signature loan does carry a higher interest rate than loans directly secured by vehicles or real property. On June 1, 2002, the advertised rate for a 48-month signature loan was 9.50%.

11. After an initial lending decision is made, a second more senior loan officer reviews lending decisions of greater than \$15,000. This senior loan officer is specifically authorized by the Board of Directors to review these decisions. Because Mr. Bishop’s loan exceeded \$15,000 it was submitted to, and approved by, a senior officer.

12. Once a loan is approved, a standard form Loanliner® Security Agreement is generated which lists the number, the amount of the loan, the payer and account number, the interest rate, due date, and payment schedule. Importantly, the Loanliner® agreement states that if the borrower is in default, the credit union may require immediate payment of the entire amount due. The Agreement also requires the borrower to “make

payments as disclosed above in accordance with the terms of your Plan.” All signature loans require the borrower to agree and acknowledge the credit union’s cross-collateral and offset provisions, which stipulate that any collateral pledged for other loans with the credit union and any other assets the borrower has on deposit may be seized for non-payment of a signature loan.

13. On June 17, 2002, Mr. Bishop received a 48-month signature loan for 9.50%. The loan was granted on the basis of Mr. Bishop’s Fair Isaac and internal credit number, income and his prior borrowing relationship with the credit union. The loan was evidenced by a written agreement noting it was for \$_____, issued solely to Robert W. Bishop, with an annual percentage rate of 9.500% (variable) with the first payment of \$_____ due on 07/30/2002 and each payment due thereafter on a monthly basis. Through the credit union’s standard cross-collateralization and offset provisions, Mr. Bishop secured his loan with the collateral pledged on an outstanding car loan and his assets on deposit with the credit union. Mr. Bishop was required to sign a Loanliner® agreement to receive these funds.

14. Mr. Bishop’s agreement required him to make timely payments of principle and interest. In this case, the borrower was expected to make 48 payments of \$_____ on or around the 30th of each month. Mr. Bishop actually repaid the loan more quickly than required:

**AFFIDAVIT OF BARNEY B. CHAPMAN
IN RESPONSE TO MUR 5381**

***Redacted Affidavit
for Public Disclosure***

<u>Payment Date</u>	<u>Payment Amount</u>
7-27-02	\$ _____
9-7-02	\$ _____
10-7-02	\$ _____
11-19-02	\$ _____
12-24-02	\$ _____
1-28-03	\$ _____
2-10-03	\$ _____
3-1-03	\$ _____
3-11-03	\$ _____
4-14-03	\$ _____
5-13-03	\$ _____
Total Paid	<hr/> \$ _____
Amount Due	0

15. America First is pleased with the lending decision it made in this case. The loan was granted to a member in good standing with an excellent credit score. The terms of the loan were standard, and were generated by our computer and approved by two loan officers. The loan required no direct collateral or security interest because we do not require them in loans of this amount to borrowers of Mr. Bishop's income and credit history. The loan did, however, have our standard cross-collateral and offset provisions. America First Credit Union has made lending decisions such as this for years and continues to make lending decisions for others in the same way it did for Mr. Bishop. America First Credit Union is pleased to report to our shareholders that these loans

**AFFIDAVIT OF BARNEY B. CHAPMAN
IN RESPONSE TO MUR 5381**

***Redacted Affidavit
for Public Disclosure***

generate significant income for the credit union and the amount lost on these items is at or below industry norms.

16. America First is vigilant in its compliance with state and federal regulations. We scrupulously follow the letter and spirit of laws, regulations and our internal guidelines. In every conceivable way, our loan to Mr. Bishop was made in our ordinary course of business, and on a basis that assured repayment.

17. America First mailed four postcards to some of its members advocating the election of Robert Bishop to the U.S. Congress. Approximately 34,225 members received these mailings. The members who received these mailing were America First Credit Union members who were also Republican Primary voters in the 1st Congressional District of Utah. The cost of each of these four mailings was approximately \$8,425.29. Rex Rollo, Executive Vice President and Chief Financial Officer signed several FEC Form 7s noting the date, amount, purpose and beneficiary of these mailings.

18. America First also engaged in other partisan activities advocating the election of Mr. Robert Bishop: messaging GOTV phone calls on June 20, 2002, costing \$2,329.03; messaging GOTV phone calls on June 24, 2002 costing \$1,789.92; and a member advocate mailing on June 15, 2002 costing \$1,226.46. Rex Rollo signed several FEC Form 7s noting the date, amount, purpose and beneficiary of these mailings.

19. America First Credit Union spent a total of \$39,071.87 in partisan communication costs benefiting Rob Bishop from June 14-21, 2002. America First Credit Union reported a total of \$39,071.81 in partisan communication costs to the FEC on Form 7.

**AFFIDAVIT OF BARNEY B. CHAPMAN
IN RESPONSE TO MUR 5381**

***Redacted Affidavit
for Public Disclosure***

20. In all these communications, America First acted on the advice of counsel knowledgeable in federal election campaign finance law. The content, preparation, execution payment and reporting of these communications was correct, true and promptly reported to the Federal Election Commission.

RPP/78240 1

Invoice



DATE

INVOICE #

6/28/2002

BB10019

BILL TO

AMERICA FIRST CREDIT UNION
1344 W 4675 SO
OGDEN, UT 84405

4655 6633 00
11

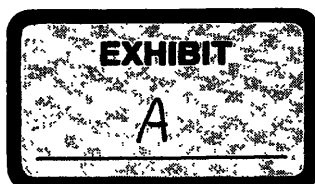
P.O. NUMBER	TERMS	REP	SHIP	VIA	F O.B.	PROJECT
BB10019	Due on receipt	BB	6/18/2002			
QUANTITY	ITEM CODE	DESCRIPTION			PRICE EACH	AMOUNT
		ROB BISHOP POSTCARD				
136,900	CASS & PAVE	CASS & PAVE			0.0065	889.85
136,900	INK	INK JET ADDRESS, SORT, WRAP, DELIVER TO POST OFFICE			0.0195	2,669.55
136,900	M/S	MAILING SERVICE			0.01	1,369.00
136,900	POSTAGE	POSTAGE USED			0.15378	21,052.76
		SALES TAX			6.60%	0.00

RECEIVED
BY ACCT.

JUL 15 2002

Sent to _____
Fr. Approval _____
Ack. _____
Date _____

Ball



Total

\$25,981.16

Payments/Credits

\$-22,052.76

Balance Due

\$3,928.40

(801) 974-7600 • 1841 S. Pioneer Road • Salt Lake City, UT 84104 • Fax: (801) 974 - 3047

Accounts beyond scheduled terms will be subject to a finance charge of 1 1/2% per month (18% annual rate).

Customer agrees to pay all costs of collection and reasonable attorneys fees should collection become necessary

CU-Serve

1805 S. Redwood Road
Salt Lake City, UT 84104

Invoice

DATE

6/30, 2002

INVOICE #

4029

BILL TO

America First Credit Union
P O Box 9199
1344 W 4675 South
Ogden UT 84409-0199

217 (7)
520130
11

P.O. NO.

TERMS

PROJECT

Printing

QUANTITY

DESCRIPTION

RATE

AMOUNT

136,900 Rob Bishop cards
Utah Sales Tax

0 0529
6 60%

7 242 011
477 97

OK [Signature]

EXHIBIT

Total

\$7 719 98

CHECK REQUEST

Date: 6/14/02

Payee: Salt Lake Mail

Address: _____

Amount: \$ 22,052.76

Accounting unit: _____

Account number: _____

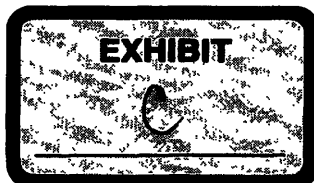
Description:

All 4 Bishop postcards

Please return check to: _____

Check authorized by: [Signature]
(Signature)

AFCU #230 10/93 I



25-04-110-2063

RECEIVED
FEC MAIL ROOMREPORT OF COMMUNICATION COSTS
BY CORPORATIONS AND MEMBERSHIP ORGANIZATIONS

JUL 20 P 12:55

1. (a) NAME OF ORGANIZATION <u>America First Credit Union</u>		2. IDENTIFICATION NUMBER (Assigned by FEC)	
(b) ADDRESS (Number and Street) <u>1334 W. 4675 S.</u>		3. TYPE OF ORGANIZATION (Check Appropriate Box) <input type="checkbox"/> Corporation <input type="checkbox"/> Trade Association <input type="checkbox"/> Labor Organization <input checked="" type="checkbox"/> Cooperative <input type="checkbox"/> Membership Organization <input type="checkbox"/> Corporation without capital stock	
(c) CITY, STATE AND ZIP CODE <u>Ogden Utah 84409</u>			
4. TYPE OF REPORT (Check One) (a) <input type="checkbox"/> April 15 Quarterly Report <input checked="" type="checkbox"/> July 15 Quarterly Report <input type="checkbox"/> October 15 Quarterly Report <input type="checkbox"/> 12 Day Pre-General Election Report held on _____ in the State of _____ <input type="checkbox"/> January 31 Year End Report			

(b) Is this Report an Amendment? ☐ YES ☒ NO5 THIS REPORT COVERS THE PERIOD 4/1/02 THROUGH 6/30/02

SUMMARY OF COMMUNICATION COSTS

Type of Communication	Class or Category Communicated With	Date(s) of Communication	Check One		Identify Candidate, Office Sought, District and State, and Whether for Primary or General Election	Cost of Communication (Per Candidate)
			Support	Oppose		
<input checked="" type="checkbox"/> Direct Mail	<input type="checkbox"/> Executive/Administrative Personnel	6/14	✓		Rob Bishop House of Rep District 1, Utah Primary	\$8,425.22
<input type="checkbox"/> Telephone	<input type="checkbox"/> Stockholders					
<input type="checkbox"/> Telegram	<input checked="" type="checkbox"/> Members					
<input type="checkbox"/> Other (Specify)						
<input checked="" type="checkbox"/> Direct Mail	<input type="checkbox"/> Executive/Administrative Personnel	6/18	✓		Rob Bishop House of Rep. Dist. 1, Utah Primary	\$8,425.22
<input type="checkbox"/> Telephone	<input type="checkbox"/> Stockholders					
<input type="checkbox"/> Telegram	<input checked="" type="checkbox"/> Members					
<input type="checkbox"/> Other (Specify)						

(NOTE: For additional communications, attach separate sheets containing the same information as above.)

TOTAL COMMUNICATION COSTS FOR THIS PERIOD \$ 39,071.62

I certify that I have examined this report and, to the best of my knowledge and belief, it is true, correct and complete.

Type or Print Name

[Signature]
Signature and Title of Person Designated to Sign This Report

Date

NOTE: Submission of false, misleading, or incomplete information may subject the person signing this report to penalties of 2 U.S.C. 5437g

WHERE TO FILE:
Federal Election Commission
899 E Street, N.W.
Washington, D.C. 20463

FOR FURTHER INFORMATION CONTACT
Federal Election Commission
Toll Free: 800-424-9680
Local: 202-694-1100

FEB 1998 FOF

FEC FORM 7 (28001)

EXHIBIT

RECEIVED
FEC MAIL ROOMREPORT OF COMMUNICATION COSTS
BY CORPORATIONS AND MEMBERSHIP ORGANIZATIONS

JUL 20 P 12:55

1. (a) NAME OF ORGANIZATION America First Credit Union	2. IDENTIFICATION NUMBER (Assigned by FEC)
(b) ADDRESS (Number and Street) 1334 W. 46th St.	3. TYPE OF ORGANIZATION (Check Appropriate Box) <input type="checkbox"/> Corporation <input type="checkbox"/> Trade Association <input type="checkbox"/> Labor Organization <input type="checkbox"/> Cooperative <input type="checkbox"/> Membership Organization <input type="checkbox"/> Corporation without capital stock
(c) CITY, STATE AND ZIP CODE Ordan, UT. 84409	

4. TYPE OF REPORT (Check One):
☐ April 15 Quarterly Report ☒ July 15 Quarterly Report ☐ October 15 Quarterly Report
☐ 12 Day Pre-General Election Report held on _____ in the State of _____
☐ January 31 Year End Report

(b) Is this Report an Amendment? ☐ YES ☒ NO5. THIS REPORT COVERS THE PERIOD **4/1/02** THROUGH **6/30/02**

SUMMARY OF COMMUNICATION COSTS

Type of Communication	Class or Category Communicated With	Date(s) of Communication	Check One		Identify Candidate, Office Sought, District and State, and Whether for Primary or General Election	Cost of Communication (per Candidate)
			Support	Oppose		
<input checked="" type="checkbox"/> Direct Mail	<input type="checkbox"/> Executive/Administrative Personnel	6/20	/		Rob Bishop House of Rep. District 1, Utah Primary	\$8,426.22
<input type="checkbox"/> Telephone	<input type="checkbox"/> Stockholders					
<input type="checkbox"/> Telegram	<input checked="" type="checkbox"/> Members					
<input type="checkbox"/> Other (Specify)						
<input checked="" type="checkbox"/> Direct Mail	<input type="checkbox"/> Executive/Administrative Personnel	6/21	/		Rob Bishop House of Rep. Primary Dist. 1, Utah	\$8,426.22
<input type="checkbox"/> Telephone	<input type="checkbox"/> Stockholders					
<input type="checkbox"/> Telegram	<input checked="" type="checkbox"/> Members					
<input type="checkbox"/> Other (Specify)						

(NOTE: For additional communications, attach separate sheets containing the same information as above.)

TOTAL COMMUNICATION COSTS FOR THIS PERIOD : **\$16,852.44**

I certify that I have examined this report and, to the best of my knowledge and belief, it is true, correct and complete.

Type of Print Name _____ Signature and Title of Person Designated to Sign This Report _____ Date _____

NOTE: Submission of false, erroneous, or incomplete information may subject the person signing this report to penalties of 2 U.S.C. §4372.

WHERE TO FILE:
 Federal Election Commission
 899 E Street, N.W.
 Washington, D.C. 20463

FOR FURTHER INFORMATION CONTACT:
 Federal Election Commission
 Toll Free: 800-424-9536
 Local: 202-694-1100

FEB 1993 FOF

FEC FORM 7 (32001)

EXHIBIT